In the Supreme Court of the United States

OCTOBER TERM, 1974

CHIM MING AND LAM YIM YIM, PETITIONERS

v.

SOL MARKS, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The question presented is whether Chinese alien seamen with Hong Kong documents, who are in this country illegally, are entitled to relief from deportation under the United Nations Protocol Relating to the Status of Refugees.

Petitioners are natives of the Republic of China. Subsequent to the ouster of the Nationalist government from mainland China, they migrated to Hong Kong. They obtained papers there for employment as seamen and were so employed until entry into the United States.

Petitioners entered this country as nonimmigrant crewmen, with authorization under Section 252 of the Immigration and Nationality Act, 66 Stat. 220, to remain for a period not to exceed 29 days. 8 U.S.C. 1282. They failed to depart within the authorized period, however, and deportation proceedings commenced after they were

apprehended by officers of the Immigration and Naturalization Service. Following a hearing at which each petitioner conceded the factual allegations of the deportation charge, they were found to be deportable to Hong Kong. Neither of the petitioners appealed this finding (Pet. App. 2a-3a).

Following the deportation orders and pursuant to the United Nations Protocol Relating to the Status of Refugees ("Protocol"),[1] petitioners filed applications for political asylum as refugees. The District Director of the Immigration and Naturalization Service denied each of the requests (Pet. App. 27a-29a).[2]

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[1]The effect of the Protocol was to make Articles 2 through 34 of the 1951 Geneva Convention Relating to the Status of Refugees ("Convention") applicable to the United States. The Protocol, 19 U.S.T. 6224, 6257, was advised by the Senate on October 4, 1967, approved by the President on October 15, 1968, and became effective on November 1, 1968.

[2]Petitioner Chim Ming was born in mainland China in 1919 and resided in that country until he entered Hong Kong in 1955. He was admitted to this country as a nonimmigrant crewman in April 1967. He did not depart within the period authorized and was apprehended by officers of the Immigration Service in January 1968. Petitioner Ming was found deportable on February 9, 1968, and released on bond. He failed to surrender for deportation and was not reapprehended until late 1972. On November 24, 1972, petitioner submitted his application for political asylum to the Service. He was interviewed by an officer of the Immigration Service on December 1, 1972, and in accordance with procedures then in effect, the information was forwarded to the Department of State for an advisory opinion. On December 20, 1972, the Department of State responded that petitioner Ming had failed to establish that he was a political refugee and that deportation to Hong Kong would be appropriate. On January 16, 1973, petitioner was notified that his request was denied (Pet. App. 27a).

Petitioner Lam Yim Yim resided in mainland China from his birth in 1933 until 1961 when he entered Hong Kong. He was

Petitioners thereafter brought suit in the United States District Court for the Southern District of New York seeking an injunction to restrain their deportations.[3] The district court denied petitioners' request for an injunction and granted summary judgment in favor of respondents (Pet. App. 6a-26a). The court held that—even assuming that petitioners are "refugees"—they were not "lawfully in [the] territory" as required by the express language of Article 32(1) of the Convention, the Convention's history and the legislative history of the Protocol in the Senate. The court therefore concluded that petitioners were not entitled to the benefits of the Protocol. The court of appeals affirmed *per curiam* (Pet. App. 1a-5a).

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admitted to this country on May 19, 1972, as a nonimmigrant crewman but did not depart within the period authorized. He was apprehended by officers of the Immigration Service on September 21, 1972. A deportation hearing was held on October 3, 1972, at which petitioner Lam Yim Yim, represented by counsel, conceded deportability. He was found to be deportable and granted the privilege of voluntary departure. Again, however, he did not depart within the specified period and a warrant of deportation was issued against him on March 16, 1973. On March 27, 1973, petitioner submitted a request for political asylum. Following a hearing, his request was denied (Pet. App. 28a-29a).

[3]As noted by the district court (Pet. App. 7a, n. 1), 127 additional, but similar, suits have been filed in the Southern District of New York seeking stays of outstanding deportation orders. Counsel for the plaintiffs in those suits have agreed that petitioners' claims are representative of the claims of all of the plaintiffs and have agreed to be bound by the decisions rendered in the cases involving petitioners.

Petitioners' claim here is essentially that under the terms of the Protocol they are "refugees" and that, accordingly, they may not be expelled except on grounds of national security or public order. This contention was also made, and rejected, in *Kan Kam Lin* v. *Rinaldi*, 493 F.2d 1229 (C.A. 3), certiorari denied, October 15, 1974, No. 73-1710, and is fully discussed in our Brief in Opposition in that case.[4]

Article 32 of the Convention, and the corresponding provision of the Protocol (see n. 1, *supra*), provide in relevant part:

> The Contracting States shall not expel *a refugee lawfully in their territory* save on grounds of national security or public order. [Emphasis added.][5]

Petitioners' claim is thus refuted by the express terms of the Convention and Protocol. As the courts below found, the history of the Convention and the course of the Senate's deliberations with respect to the Protocol provide conclusive support for the conclusion that a refugee must be in the United States in conformity with our immigration laws to be entitled to invoke the provisions of the Protocol. See Robinson, *Convention Relating to the Status of Refugees—Its History, Contents and Interpretation*, pp. 156-157 (1953); *Ad Hoc Committee on Statelessness and Related Problems, Report*, U.N.E.C.O.S.O.C. at 47, U.N. Doc. E/1618/Corr. 1; E/AC. 32/5/Corr. 1 M (March 2, 1950); *Ad Hoc Committee on Statelessness and Related*

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[4]We are serving upon petitioners' counsel a copy of the Brief in Opposition filed by the government in *Kan Kam Lin*.

[5]Article 1(A)(2) defines a "refugee" as any person who

> * * * owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Problems, Report, U.N.E.C.O.S.O.C. at 11, U.N. Doc. E/1850; E/AC. 32/8 (August 25, 1950); Appendix, 90th Cong., 2d Sess., Executive Report No. 14, Protocol Relating to Refugees, September 30, 1968, at 6.

In summary, the courts below properly held that the status accorded refugees must be viewed in the context of the legality of their presence under the immigration laws of the United States. Since petitioners admittedly are in this country illegally, the benefits of the Protocol are not available to them.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.